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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID LYNN CORKERN, Defendant and Appellant.	F075066 (Super. Ct. No. BF161237A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

David Lynn Corkern was charged with a sole count of murder (Pen. Code, § 187, subd. (a))[1] and enhancement allegations that he personally and intentionally discharged a firearm (§ 12022.53, subd. (d)) and personally used a firearm during the commission of the offense (§ 12022.5, subd. (a)). He entered a plea of not guilty and not guilty by reason of insanity. A jury found Corkern guilty as charged and sane. The trial court sentenced Corkern to 25 years to life, plus 25 years to life for the section 12022.53, subdivision (d) enhancement. The section 12022.5, subdivision (a) enhancement was stayed pursuant to section 654.

On appeal, Corkern raises issues relating to jury instructions during the sanity phase of the trial and, in supplemental briefing, contends we should remand to allow the trial court to exercise its discretion to strike the firearm use enhancements under section 12022.5, subdivision (c), and 12022.53, subdivision (h). The People concede the latter issue and we agree. We affirm the conviction, but remand for resentencing for the trial court to decide whether to strike the firearm use enhancements.

STATEMENT OF THE FACTS

Guilt Phase

Prosecution

On August 20, 2015, Corkern shot and killed his nephew, Adrian, by shooting him in the back of the head. At the time, Adrian was sitting in a recliner in the home of his parents, Sandra and Augustine Calzada.[2] After the shooting, Corkern went to a nearby diner and ordered a meal, before he was found and taken into custody. As he was being arrested, Corkern told sheriff deputies voices told him to shoot Adrian and that he, Sandra, and Adrian were all supposed to go to heaven when he killed Adrian.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] Because Sandra, Augustine, and Adrian share the same last name, we will refer to them by first name for clarity.

Sheriff's Detective Patrick McIrvin interviewed Corkern, who waived his *Miranda*[3] rights, and the recorded interview was admitted into evidence. In the interview, Corkern stated that God was talking to him and that he, Sandra, and Adrian were supposed to go to heaven when he shot Adrian, but that it did not work. Corkern admitted standing behind Adrian and shooting him in the head. Corkern said he loved Sandra and Adrian and that he killed Adrian out of love because he was told to.

A friend and neighbor of Adrian's, who was familiar with the symptoms of methamphetamine use, noticed Corkern had been exhibiting such symptoms, including talking to himself and head twitching. Detective McIrvin also observed symptoms of methamphetamine use during his interview with Corkern, including rapid, twitchy movements, some bruxism in his jaw, involuntary movement in his hand, and statements of paranoia and hearing voices. Corkern admitted during his interview with Detective McIrvin that he had been using methamphetamine for several years and had used the drug a few days before the murder. A glass methamphetamine pipe was found in Corkern's home, and he tested positive for methamphetamine in his urine. While anything above 25 nanograms per milliliter is considered a positive test, the concentration of methamphetamine in Corkern's sample was 78,083 nanograms per milliliter. It also included 13,644 nanograms per millimeter of amphetamine, its metabolite.

Corkern previously told Sandra that he faked mental illness in order to collect Social Security and get retirement disability from UC Santa Barbara, where he previously worked as a custodian.

Defense

Psychiatrist Timothy Tice treated Corkern sporadically from 2003 to 2005. Corkern did not report any methamphetamine use to Dr. Tice, but said he was depressed and anxious, and was hearing voices. Dr. Tice's ultimate diagnosis was schizoaffective

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

disorder, bipolar type, and panic disorder with agoraphobia. Dr. Tice acknowledged that substance abuse can mimic symptoms of some diagnoses, including schizoaffective disorder, and that most people with schizoaffective disorder exhibit symptoms between ages 17 to 28. It was unusual to see schizoaffective disorder developing for the first time at Corkern's age, who was in his mid-40s at the time he reportedly began exhibiting symptoms.

Psychologist Michael Musacco was retained by the defense to conduct a psychological evaluation of Corkern in preparation for trial. Dr. Musacco administered a malingering test on Corkern, on which a score of six or more indicates that a person is malingering. Corkern scored a 12 the first time the test was administered and a five on a subsequent reexamination. Dr. Musacco testified that, with respect to the first score, some of Corkern's responses "were completely inconsistent with what a mentally ill person would experience or describe." For example, Dr. Musacco testified that, while Corkern claimed he had been hearing voices continually that lasted for days, typical auditory hallucinations wax and wane over the course of a day. Dr. Musacco also acknowledged that it was unusual Corkern had a "snapback to reality" effect as soon as he realized that shooting Adrian did not bring them to heaven. Despite these facts, Dr. Musacco believed Corkern's symptoms to be genuine.

Dr. Musacco diagnosed Corkern with stimulant use disorder based on his methamphetamine use and with schizoaffective disorder. He thought it significant that Corkern received similar diagnoses from different doctors over a period of time. However, he conceded that the use of methamphetamine alone can create symptoms of psychosis, and could exacerbate preexisting symptoms of a mental disorder. Dr. Musacco opined that Corkern's mental disorder influenced the events leading up to the murder.

Sanity Phase

Defense

Corkern was married to Vinita Corkern[4] from 1981 to 2000, during which time he worked as a custodian at UC Santa Barbara. Vinita saw Corkern smoke marijuana early in their marriage, but never saw him using any other illegal drugs, although she admitted she was unfamiliar with methamphetamine, its paraphernalia, or its symptoms. In 1991, their eldest son drowned and Corkern became very depressed. Corkern and Vinita filed for divorce in 2000, and after a few years, Corkern stopped coming to see their other children.

In 2007, Corkern called Vinita and told her he was going to see their deceased son in heaven, after which he attempted suicide. After the suicide attempt, his daughter Crystal visited his home, which was very messy and had Bible verses and sayings written on the walls. Some of the deceased child's belongings were on the floor, broken. Corkern told Crystal that voices told him to write on the walls of his home. While Crystal never suspected Corkern of methamphetamine use when she was around him, she did find a methamphetamine pipe in his home.

Psychologist Gary Longwith reviewed all of Corkern's medical records and listened to the recorded police interviews. He testified it "was clear there was an altered mental status" because Corkern had some pressured speech, had difficulty producing some of the thoughts he wanted to express, and spoke about delusional material regarding God speaking to him, the devil and black magic. Dr. Longwith opined that, at the time of the murder, Corkern did not have the ability to distinguish between right and wrong due to his delusions. While he believed Corkern's methamphetamine use may have "made it a little bit easier to make the decision, … it wasn't responsible for the decision."

On cross-examination, Dr. Longwith admitted that Corkern was very aware that he was shooting his nephew in the back of the head, and also that Corkern's previous mental health records did not contain any strong indications of any command hallucinations like

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[4] Again, for clarity, we will refer to Vinita by her first name.

the ones he claimed to experience the morning of the murder. Dr. Longwith also conceded that it was unusual for such delusions and hallucinations to cease immediately after a crime was committed, and that someone would not typically develop schizoaffective disorder at Corkern's age unless something else, like a stimulant use disorder, was at play.

Dr. Musacco was recalled and opined that Corkern was "unable to have a reality-based understanding of what was occurring" and, as a result of his mental disorder, was "unable to morally understand that what he was doing was wrong." However, on cross-examination, he did agree that Corkern certainly knew he was shooting Adrian in the back of the head when he did it. And Dr. Musacco "[one] hundred percent agree[d]" with the idea that Corkern "knew before, during and after that, generally speaking, killing was wrong …."

Rebuttal

Psychologist Nicanor Garcia, who was appointed to evaluate Corkern and testify for the prosecution, noted that, during the 23 years Corkern worked at UC Santa Barbara, he seemed to do well, received promotions and raises, and did not appear to have any issues until 2003. During Dr. Garcia's examination of Corkern, Corkern was able to keep good eye contact, was engaging, and demonstrated good memory. He had some issues with articulation, but not to the extent that Dr. Garcia was unable to understand him. Corkern told Dr. Garcia that he did not start hearing voices until he was already at his sister Sandra's house. In contrast, he previously told police officers that voices commanded him to go to Sandra's house that morning. One test result showed Corkern was malingering and "overendorsing" psychological symptoms that were not consistent with legitimate mental health disorders. Corkern had also said that, looking back at the murder, he realized what he did was wrong.

Dr. Garcia took issue with the fact that, according to Corkern, his hallucinations stopped immediately when he realized that he was not in heaven:

> "[I]n my experience, with individuals that have robust and acute psychopathology, there's not this event that kind of all of a sudden it occurs and they are transformed into lucidity and they know everything that's going on. [¶] … [I]t definitely doesn't seem that he was in a psychotic state because he was able to easily pull out of it after the pull of the trigger."

In addition, Dr. Garcia was concerned and noted Corkern's response after the murder was to hide the gun, as typically people having a psychotic episode are so detached from reality and "their delusions and hallucinations have so much control over them that they don't care if they're going to get caught. They want to … complete what the voices are telling them to do." According to Dr. Garcia, Corkern exhibited planning behavior and had clarity immediately following the murder. Dr. Garcia opined that Corkern was not insane at the time of the offenses.

DISCUSSION

I. DID THE TRIAL COURT ERR WHEN IT INSTRUCTED THE JURY TO PRESUME SANITY AND THAT DEFENDANT HAD THE BURDEN OF PROVING INSANITY?

At the beginning of the sanity phase of the trial, the trial court instructed, in part,

> "You have found the defendant guilty of first-degree murder while personally discharging a firearm. Now you must decide whether he was legally insane when he committed the crime. [¶] A defendant is presumed to be sane when he commits the crime. This presumption requires that the defense prove, by a preponderance of the evidence, that the defendant was legally insane when he committed the crime." (CALCRIM No. 220A.)

At the conclusion of evidence in the sanity phase, the trial court repeated the above instruction.

Corkern is challenging the jury instruction for both providing for a presumption of sanity and allocating to him the burden of proving his legal insanity by a preponderance of the evidence, claiming the instruction violated his Fifth and Sixth Amendment rights by lightening the prosecutor's burden of proving the elements of the charged offense. We disagree with the premise that sanity is an element of the charged offense and find no error.

Corkern argues that the decisions of the United States Supreme Court (*Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Jones v. United States* (1999) 526 U.S. 227; see also *Blakely v. Washington* (2004) 542 U.S. 296) have impliedly overruled established law holding sanity is not an element of any offense. (*People v. Drew* (1978) 22 Cal.3d 333, 348–349, superseded by statute as noted in *People v. Skinner* (1985) 39 Cal.3d 765, 768–769; see *Leland v. Oregon* (1952) 343 U.S. 790 [statutes requiring defendant to prove the affirmative defense of insanity beyond a reasonable doubt were constitutional]; Evid. Code, § 522 [assigning burden of proof of insanity to defendant].)

In *People v. Ferris* (2005) 130 Cal.App.4th 773 (*Ferris*), we rejected an identical claim. (*Id.* at pp. 777–780.) In doing so, we concluded *Leland v. Oregon, supra,* 343 U.S. 790 was still good law after *Apprendi* and *Ring.* (*Ferris, supra,* at p. 780.) This court explained:

> "Insanity has not been characterized by the United States Supreme Court or California courts as an element of the offense; it is found to be in the nature of a defense that relieves defendant of culpability for his or her convictions. 'An insanity plea ... is a plea to the effect that the defendant, even if guilty, should not be punished for an offense because he was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the offense.' [Citation.] [¶] *Apprendi* instructs that a state cannot disguise 'elements' by calling them enhancements or sentencing factors, when in fact they are used to impose a higher sentence than was authorized by the jury's verdict alone. The sanity portion of a trial does not involve questions of guilt versus innocence, but involves questions of criminal responsibility versus legal insanity. A finding of sanity does not increase the maximum penalty one can receive if punished according to the facts as reflected in the jury verdict alone. Neither *Apprendi* nor *Ring* in any way impliedly overrules the decisions holding that insanity is not an element of a criminal offense." (*Ferris, supra,* at p. 780.)

Although Corkern acknowledges our holding in *Ferris*, he contends it was wrongly decided. We continue to agree with our reasoning in *Ferris* and on the same basis, reject Corkern's claim.

II. DID THE TRIAL COURT ERR WHEN IT INSTRUCTED THAT, IF FOUND INSANE, CORKERN COULD BE PLACED IN OUTPATIENT TREATMENT?

The trial court also instructed with CALCRIM No. 3450, which stated in part:

> "If you find the defendant was legally insane at the time of his crime, he will not be released from custody until a court finds he qualifies for release under California law. Until that time he will remain in a mental hospital or an outpatient treatment program, if appropriate. He may not generally be kept in a mental hospital or outpatient program longer than the maximum sentence available for his crime.… You must not let any consideration about where the defendant may be confined or for how long affect your decision in any way."

CALJIC No. 4.01, the predecessor to CALCRIM No. 3450, was drafted in response to two appellate court cases (*People v. Moore* (1985) 166 Cal.App.3d 540; *People v. Dennis* (1985) 169 Cal.App.3d 1135), which found that, on request of the defendant or jury, the trial court must instruct regarding the consequences of a not guilty by reason of insanity verdict.[5] (*People v. Kelly* (1992) 1 Cal.4th 495, 538.) The purpose of the instruction is "to aid the defense by telling the jury not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*Ibid.;* accord, *People v. Moore, supra*, at p. 554.)

Corkern argues the instruction, as given, was "grossly misleading" because it did not inform the jury that "placement in an outpatient treatment program was not a possible

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[5] There is no trial court duty to give such an instruction on its own motion when the defendant indicates he or she does not want the instruction. (*People v. Jones* (1997) 15 Cal.4th 119, 179, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) A defendant reasonably can choose not to request the instruction "for fear it might focus the attention of the jury upon the possibility of the defendant's release if he is restored to sanity." (*People v. Jones, supra*, at p. 179.)

outcome unless and until five separate criteria had been met," and instead could mislead some jurors to assume outpatient treatment meant Corkern would "walk free." The "criteria" Corkern insists should have been included in the instruction include statutorily mandated inpatient treatment for a minimum of 180 days in specified cases, including murder, for which Corkern was convicted. (§ 1601, subd. (a).) Corkern contends both that the trial court erred in giving the instruction as it did, and that defense counsel was ineffective for failing to request a modification which would have included the criteria.

We find no error on the part of the trial court. The purpose of the challenged portion of CALCRIM No. 3450 is to ensure the jury does not improperly find a defendant sane based on a fear that the defendant will otherwise "walk free." (*People v. Moore, supra,* 166 Cal.App.3d at p. 554 [addressing CALJIC No. 4.01].) The purpose is not to give the jury a detailed summary of the outpatient placement procedures and requirements, which are not relevant to the jury's task of considering the defendant's sanity at the time of the offense. (See *People v. Beames* (2007) 40 Cal.4th 907, 932–933 [in response to jury's question, trial court need not instruct on law of commutation exhaustively; details of commutation process are not relevant to jury's task].) CALCRIM No. 3450 adequately accomplishes its purpose by telling the jury, if they find the defendant legally insane at the time of his crime, "he will not be released from custody until a court finds he qualifies for release under California law," informing the jury of the general scheme of the applicable mental health laws, and specifically instructing the jurors not to consider where or for how long the defendant may be confined in deciding the defendant's sanity at the time of his crimes.

To have added further specific information regarding the mandated inpatient treatment for a minimum of 180 days under section 1601, subdivision (a), would have invited the kind of jury speculation about Corken's possible early release from confinement that the instruction was designed to forestall. (See *People v. Dennis, supra,*

169 Cal.App.3d at p. 1141, fn. 14 ["jury can no more be concerned with the possible length of a defendant's commitment than with the possible length of a prison term"].)

Because we have determined that there was no error in the trial court's instruction, we need not address further Corkern's claim that counsel was ineffective for failing to request modifications to the instruction.

III. SENATE BILL NO. 620

Corkern contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the firearm use enhancements to Corkern's sentence pursuant to sections 12022.5, subdivision (a), and 12022.53, subdivision (d).

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to give trial courts discretion to strike firearm use enhancements under these sections in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h), as amended by Stats. 2017, ch. 682.) Both sections contain identical language: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

The People concede sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended, apply retroactively to Corkern, whose sentence was not final at the time those provisions came into effect. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) Further, the People concede remand is necessary to allow the trial court to exercise the discretion it did not have at the time of sentencing because the trial court did not indicate whether it would have stricken the firearm use enhancements if

it had the discretion. "[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels*, at p. 425; accord, *People v. Billingsley*, at p. 1081 [remand is required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"].)

Remand for resentencing is appropriate to allow the trial court to consider whether to exercise its discretion to strike the firearm use enhancements under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), in the interest of justice.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), and if stricken, to resentence Corkern and send an amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

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FRANSON, Acting P.J.

WE CONCUR:

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SMITH, J.

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SNAUFFER, J.